

# **EXHIBIT**

# **5**

**ORIGINAL FILED**

STATE OF NEW YORK  
SUPREME COURT: COUNTY OF NIAGARA

FEB 07 2014

WAYNE F. JAGOW  
NIAGARA COUNTY CLERK

JOANN ABBO-BRADLEY, Individually and as  
Parent and Natural Guardian of  
DYLAN J. BRADLEY, TREVOR A. BRADLEY  
and CHASE Q. BRADLEY, Infants;  
ZACHARY and MELANIE HERR,  
Individually and as Parent and Natural Guardian  
of COLETON HERR and HEATHER HERR, Infants;  
NATHAN E. and ELENA KORSON,  
Individually and as Parent and Natural Guardian of  
LOGAN J. KORSON, an Infant,

**ORDER**

Plaintiffs,

Index No. 146816

v.

CITY OF NIAGARA FALLS; NIAGARA FALLS  
WATER BOARD; GLENN SPRINGS HOLDINGS, INC.;  
CONESTOGA-ROVERS & ASSOCIATES;  
CECOS INTERNATIONAL, INC.; EDWARD S. ROBERTS;  
GROSS PHC LLC; KANDEY COMPANY, INC.;  
MILLER SPRINGS REMEDIATION MANAGEMENT, INC.;  
OCCIDENTAL PETROLEUM CORPORATION (HOOKER),  
Individually and as Successor in Interest to  
Hooker Chemicals and Plastics Corporation;  
OXY, INC., f/k/a OCCIDENTAL CHEMICAL CORPORATION,  
Individually and as Successor in Interest to  
Hooker Chemicals and Plastics Corporation;  
OP-TECH ENVIRONMENTAL SERVICES;  
ROY'S PLUMBING, INC.; SCOTT LAWN YARD, INC.;  
and SEVENSON ENVIRONMENTAL SERVICES, INC.,

Defendants.

WHEREAS, defendants Glenn Springs Holdings, Inc. ("GSH"), Miller Springs  
Remediation Management, Inc. ("MSRM"), and Occidental Chemical Corporation ("OCC"),  
have moved this Court, pursuant to N.Y. C.P.L.R. § 3211(a)(7), for an Order dismissing  
plaintiffs' Amended Complaint, dated March 26, 2013, on grounds that the pleading fails to state  
a cause of action in compliance with the pleading requirements of N.Y. C.P.L.R. §§ 3013 and  
3016(b); and

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WHEREAS, defendant City of Niagara Falls (the "City") has moved this Court, pursuant to N.Y. C.P.L.R. § 3211(a)(7), for an Order dismissing plaintiffs' Amended Complaint, dated March 26, 2013, on grounds that the pleading fails to state a cause of action in compliance with the pleading requirements of N.Y. C.P.L.R. §§ 3013 and 3016(b); and

WHEREAS, defendant Op-Tech Environmental Services ("Op-Tech") has moved this Court, pursuant to N.Y. C.P.L.R. § 3211(a)(7), for an Order dismissing plaintiffs' Amended Complaint, dated March 26, 2013, on grounds that the pleading fails to state a cause of action in compliance with the pleading requirements of N.Y. C.P.L.R. §§ 3013 and 3016(b); and

WHEREAS, defendant Scott Law Yard, Inc. ("Scott") has moved this Court, pursuant to N.Y. C.P.L.R. § 3211(a)(7), for an Order dismissing plaintiffs' Amended Complaint, dated March 26, 2013, on grounds that the pleading fails to state a cause of action in compliance with the pleading requirements of N.Y. C.P.L.R. §§ 3013 and 3016(b); and

WHEREAS, defendant Gross PHC LLC ("Gross") has moved this Court, pursuant to N.Y. C.P.L.R. § 3211(a)(7), for an Order dismissing plaintiffs' Amended Complaint, dated March 26, 2013, on grounds that the pleading fails to state a cause of action in compliance with the pleading requirements of N.Y. C.P.L.R. §§ 3013 and 3016(b); and

WHEREAS, defendant Severson Environmental Services ("Severson") has moved this Court, pursuant to N.Y. C.P.L.R. § 3211(a)(7), for an Order dismissing plaintiffs' Amended Complaint, dated March 26, 2013, on grounds that the pleading fails to state a cause of action in compliance with the pleading requirements of N.Y. C.P.L.R. §§ 3013 and 3016(b); and

WHEREAS, defendant Roy's Plumbing, Inc. ("Roy's") has moved this Court, pursuant to N.Y. C.P.L.R. § 3211(a)(7), for an Order dismissing plaintiffs' Amended Complaint,

dated March 26, 2013, on grounds that the pleading fails to state a cause of action in compliance with the pleading requirements of N.Y. C.P.L.R. §§ 3013 and 3016(b); and

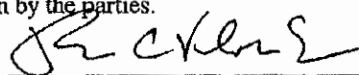
WHEREAS, a portion of the foregoing motions was decided at a Special Term of the Supreme Court, County of Niagara, in the City of Lockport, New York, on December 16, 2013, and the remainder of the motions was reserved for future decision or other action.

NOW, upon consideration of all papers, pleadings, and materials submitted by the parties, as well as all arguments presented at the hearing on the motions, it is hereby

ORDERED, that:

1. The motions of GSH, MSRM, OCC, the City, Op-Tech, Scott, Gross, Severson and Roy's are granted, to the extent that the Tenth Cause of Action in the Amended Complaint, entitled "Loss of Companionship Services" is dismissed and should be struck from the Amended Complaint; and,

2. Plaintiffs shall have thirty (30) days from the date of the above-referenced hearing to file a Second Amended Complaint that addresses the remaining issues raised by Defendants in their motions to dismiss. Accordingly, a decision of the Court with respect to all other aspects of the motions is hereby reserved and those motions are hereby held in abeyance, pending a further written decision of the Court or action by the parties.

  
Hon. Richard C. Kloch, Sr., A.J.S.C.

ENTERED:

**GRANTED**

Doc #01-2741552.1

JAN 29 2014

BY   
NICOLE SCHIUG  
COURT CLERK

{00015908}

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF NIAGARA

**ORIGINAL FILED**

FEB 07 2014

**WAYNE F. IAGOW  
NIAGARA COUNTY CLERK**

JOANN ABBO-BRADLEY, Individually and as  
Parent and Natural Guardian of  
DYLAN J. BRADLEY, TREVOR A. BRADLEY  
and CHASE Q. BRADLEY, Infants;  
ZACHARY and MELANIE HERR,  
Individually and as Parent and Natural Guardian  
of COLETON HERR and HEATHER HERR, Infants;  
NATHAN E. and ELENA KORSON,  
Individually and as Parent and Natural Guardian of  
LOGAN J. KORSON, an Infant,

**ORDER**

Plaintiffs,

Index No. 146816

v.

CITY OF NIAGARA FALLS; NIAGARA FALLS  
WATER BOARD; GLENN SPRINGS HOLDINGS, INC.;  
CONESTOGA-ROVERS & ASSOCIATES;  
CECOS INTERNATIONAL, INC.; EDWARD S. ROBERTS;  
GROSS PHC LLC; KANDEY COMPANY, INC.;  
MILLER SPRINGS REMEDIATION MANAGEMENT, INC.;  
OCCIDENTAL PETROLEUM CORPORATION (HOOKER),  
Individually and as Successor in Interest to  
Hooker Chemicals and Plastics Corporation;  
OXY, INC., f/k/a OCCIDENTAL CHEMICAL CORPORATION,  
Individually and as Successor in Interest to  
Hooker Chemicals and Plastics Corporation;  
OP-TECH ENVIRONMENTAL SERVICES;  
ROY'S PLUMBING, INC.; SCOTT LAWN YARD, INC.;  
and SEVENSON ENVIRONMENTAL SERVICES, INC.,

Defendants.

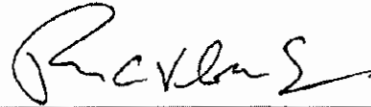
WHEREAS, defendants Glenn Springs Holdings, Inc. ("GSH"), Miller Springs  
Remediation Management, Inc. ("MSRM"), and Occidental Chemical Corporation ("OCC"),  
joined by defendants Cecos International, Inc. ("Cecos"), Sevenson Environmental Services, Inc.  
("Sevenson"), Scott Lawn Yard, Inc. ("Scott"), and Op-Tech Environmental Services ("Op-  
Tech"), have moved this Court pursuant to N.Y. C.P.L.R. § 3211(a)(10), for an Order dismissing  
plaintiffs' request for an abatement order in the Amended Complaint, dated March 26, 2013, on

grounds that the United States Environmental Protection Agency is a necessary party that is not subject to this Court's jurisdiction. The motion was heard and decided during a Special Term of the Supreme Court, County of <sup>Niagara</sup> Erie, at the Niagara County Courthouse in the City of Lockport, New York, on December 16, 2013.

NOW, upon consideration of all the papers, pleadings, and material submitted by the parties, as well as all arguments presented at the hearing on the motion, it is hereby

ORDERED, that:

1. The motion of GSH, MSRM, and OCC (joined by Cecos, Severson, Scott, and Op-Tech) is granted; and,
2. Plaintiffs' request for an abatement order is dismissed.



Hon. Richard C. Kloch, Sr., A.J.S.C.

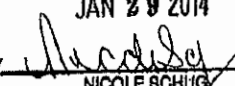
ENTERED:

**GRANTED**

JAN 29 2014

Doc #01-2741546.1

BY

  
NICOLE SCHUG  
COURT CLERK

1 STATE OF NEW YORK : COUNTY OF NIAGARA  
2 SUPREME COURT

3 -----  
4 JOANN ABBO-BRADLEY, Individually and as Parent and  
5 Natural Guardian of DYLAN J. BRADLEY,  
6 TREVOR A. BRADLEY and CHASE Q. BRADLEY, infants;  
7 ZACHARY AND MELANIE HERR, Individually and as  
8 Parent and Natural Guardian of COLETON HERR and  
9 HEATHER HERR, infants;  
10 NATHAN E. AND ELENA KORSON, Individually and as Parent  
11 and Natural Guardian of LOGAN J. KORSON, infant,  
12 Plaintiffs,

13 -vs-

INDEX # 146816

14 CITY OF NIAGARA FALLS;  
15 NIAGARA FALLS WATER BOARD;  
16 GLENN SPRINGS HOLDINGS, INC.;  
17 CONESTOGA-ROVERS and ASSOCIATES;  
18 CECOS INTERNATIONAL, INC.;  
19 EDWARD S. ROBERTS;  
20 GROSS PHC LLC;  
21 KANDEY COMPANY, INC.;  
22 MILLER SPRINGS REMEDIATION MANAGEMENT, INC.;  
23 OCCIDENTAL PETROLEUM CORPORATION (HOOKER),  
24 Individually and as Successor in Interest  
25 to Hooker Chemicals and Plastics Corporation;  
CXY, INC., f/k/a OCCIDENTAL CHEMICAL CORPORATION,  
Individually and as Successor in Interest  
to Hooker Chemicals and Plastics Corporation;  
OP-TECH ENVIRONMENTAL SERVICES;  
ROY'S PLUMBING, INC.;  
SCOTT LAWN YARD, INC.;  
and SEVENSON ENVIRONMENTAL SERVICES, INC.,  
Defendants.

-----  
175 Hawley Street  
Lockport, New York  
December 16, 2013

B E F O R E:

HONORABLE RICHARD C. KLOCH, SR.  
Acting Supreme Court Justice

LISA A. MULLANE  
OFFICIAL SUPREME COURT REPORTER



## 1 A P P E A R A N C E S:

2 WILLIAM H. MACK, ESQ.,  
3 Appearing for the Plaintiffs.

4 PAUL BARR, ESQ.,  
5 Appearing for the Plaintiffs.

6 CHRISTEN CIVILETTO MORRIS, ESQ.,  
7 Appearing for the Plaintiffs.

8 KEVIN M. HOGAN, ESQ.,  
9 DOUGLAS E. FLEMING, III, ESQ.,  
10 ANTHONY L. YOUNG, ESQ.,  
11 and SHEILA BIRNBAUM, ESQ.,  
12 Appearing for Defendants GSH, MSRM,  
13 Occidental Petroleum Corporation and Oxy, Inc.

14 DOUGLAS JANESE, ESQ.,  
15 and THOMAS O'DONNELL, ESQ.,  
16 Appearing for Defendant City of Niagara Falls.

17 JEFFREY F. BAASE, ESQ.,  
18 Appearing for Defendant Niagara Falls  
19 Water Board.

20 JEFFREY C. STRAVINO, ESQ.,  
21 Appearing for Defendant Conestoga-Rovers.

22 NELSON PEREL, ESQ.,  
23 and RUSSELL EGGERT, ESQ.,  
24 Appearing for Defendant Cecos International.

25 PATRICIA S. CICCARELLI, ESQ.,  
Appearing for Defendant Gross PHC, LLC.

JEFFREY D. SCHULMAN, ESQ.,  
Appearing for Defendant OP-Tech.

ROBERT E. KNOER, ESQ.,  
Appearing for Defendant Roy's Plumbing, Inc.

BRIAN SUTTER, ESQ.,  
Appearing for Defendant Scott Lawn Yard, Inc.

DAVID R. ADAMS, ESQ.,  
Appearing for Defendant Severson.

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1 THE CLERK: Index number 146816, Abbo-Bradley  
2 et al, versus City of Niagara Falls, Niagara Falls Water  
3 Board, et al.

4 Please note your appearances for the record,  
5 beginning with Plaintiffs' attorneys.

6 MR. MACK: Morning, your Honor. William Mack  
7 from Phillips and Paolicelli for the Plaintiffs.

8 MR. BARR: Paul Barr with Fanizzi and Barr for  
9 the Plaintiffs.

10 MS. MORRIS: Christen Morris for the  
11 Plaintiffs.

12 MR. HOGAN: Your Honor, for Defendants  
13 Occidental, Glenn Springs and Miller Springs, Kevin Hogan  
14 from Phillips Lytle.

15 MR. FLEMING: Doug Fleming from Quinn Emanuel,  
16 also for Occidental, Glenn Springs and Miller Springs.

17 THE COURT: Morning.

18 MR. EGGERT: Morning, your Honor. For the  
19 Defendant Cecos, Russ Eggert.

20 MR. PEREL: Nelson Perel from Webster Szanyi  
21 for Cecos.

22 MR. KNOER: Robert Knoer for Roy's Plumbing,  
23 Inc.

24 MR. SCHULMAN: Jeff Schulman for Op-Tech  
25 Environmental.

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1 MR. YOUNG: Tony Young, Kleinfeld, Kaplan and  
2 Becker for Occidental, Miller Springs, Glenn Springs.

3 MS. BIRNBAUM: Sheila Birnbaum, Quinn Emanuel  
4 for Oxy.

5 MS. CICCARELLI: Patricia Ciccarelli for Gross  
6 PHC.

7 MR. ADAMS: David Adams for Severson.

8 MR. SUTTER: Brian Sutter for Scott Lawn.

9 MR. BAASE: Jeff Baase, Niagara Falls Water  
10 Board.

11 MR. JANESE: Doug Janese and Tom O'Donnell for  
12 the City of Niagara Falls.

13 MR. STRAVINO: Jeff Stravino for Conestoga  
14 Rovers and Associates.

15 THE COURT: Okay. Let's deal with the most  
16 interesting aspect of this, first of all. And before I  
17 even get there, I should say I'm glad that all of the  
18 out-of-town attorneys made it in. I was really concerned  
19 Thursday and Friday, knowing that we were going to have  
20 some bad snow history and we did. But it -- it cleared  
21 up. God must like Love Canal suits because it cleared up  
22 beautiful for counsel to drive in. I hope you guys have  
23 a safe drive back.

24 But the most interesting aspect, I think, of  
25 this is the motions to dismiss the relief or the cause of

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1 action dealing with the abatement relief. And on that, I  
2 really do need some -- some argument.

3 You know, one thing, as you know, from --  
4 particularly attorneys from Buffalo who appear here more  
5 regularly, a lot of times I come out and have a decision  
6 already made. And it may be frustrating to counsel. But  
7 on this, I think I do need arguments as far as the  
8 abatement, request to dismiss those cause of actions.

9 And I guess I'll just pose these questions to  
10 -- to the Plaintiffs' side and see if you can respond  
11 and give me some guidance here. Now, there's no question  
12 -- and I understand that there's -- there's two separate  
13 main issues or themes that run through this litigation;  
14 that is, the chronic exposure that occurred allegedly to  
15 the Plaintiffs over a period of time and the acute  
16 exposure that was related to that January 11 incident,  
17 okay.

18 Let's put off the January 11 incident for the  
19 time being and deal just with the chronic exposure  
20 issue. Now, as I understand it with the chronic  
21 exposure, the Plaintiffs are claiming that since, really,  
22 the first toxic waste was put into the Love Canal and  
23 when it was sealed and when it started to migrate, that  
24 harm and that -- that wrong is continuing to today and  
25 that's what's causing the chronic exposure. Right?

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1 MR. MACK: That's correct, your Honor. That's  
2 our position today.

3 THE COURT: All right. So, when I -- and I  
4 think I -- I posed this question -- in fact, I think I  
5 have it, yes, here I do, I think I posed this last time,  
6 at the end of the last time we were here. I said how am  
7 I to provide for an order on the abatement claim? Are  
8 not EPA and DEC necessary parties? That's where I came  
9 -- right away my thought process, how can I do this  
10 abatement ruling without the EPA and DEC being here and  
11 without it being in the federal court, since they were  
12 the -- the court where the order -- the consent judgment  
13 came down? It seems to me it should be there.

14 Just for my own, you know, interest, why did  
15 you oppose the defense request to move it there? What  
16 was the tactical advantage?

17 MR. MACK: Well, your Honor, when we filed this  
18 litigation, we made certain tactical determinations and  
19 we --

20 THE COURT: That's why I'm asking, what was the  
21 tactical consideration that you wouldn't want it to be in  
22 federal court?

23 MR. MACK: Because this is a state court tort  
24 action. And we felt our clients' interests would be best  
25 served before your Honor and before the Supreme Court of

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1 the State of New York.

2 THE COURT: Okay. But --

3 MR. MACK: We don't feel there are any federal  
4 issues here whatsoever. And we felt the federal court  
5 was an inappropriate forum even for us to bring the case  
6 there in the first place.

7 THE COURT: Okay. But what about the abatement  
8 relief? If -- as I just, you know, set forth to you, the  
9 real gravamen of your complaint is that -- is this toxic  
10 waste is continuing to migrate from the Love Canal into  
11 your -- your homes, your clients' homes and causing  
12 damage. That's the nature of your complaint.

13 And I -- and I got it when I read your  
14 answering papers saying you misunderstand. By the way,  
15 you could be a great appellate court because that's what  
16 they always say, you people misunderstand. You say we  
17 just want it abated in our homes.

18 But if it's continuing to migrate, won't it  
19 continue to migrate? Wouldn't you have to abate it,  
20 like, constantly? Wouldn't -- what are -- are you  
21 suggesting independent containment systems around every  
22 individual home in and around the Love Canal  
23 neighborhood?

24 MR. MACK: Well, your Honor, I don't think as  
25 we sit here today on a motion to dismiss that we can know

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1 what type of abatement and -- well, I'll use the word  
2 remediation of our clients' homes and properties will be  
3 sufficient to protect them from the -- in the future.

4 THE COURT: If I can cut you off there, because  
5 this is oral argument, doesn't that mean by necessity  
6 that it might very well be the containment that would  
7 involve an alteration of the consent judgment and involve  
8 EPA by its very nature? If you don't know, then it could  
9 possibly involve EPA and the consent judgment.

10 MR. MACK: Well, I think, your Honor, in that  
11 -- if that were the case, and I -- I think it's equally  
12 likely if not more so that remediation and protection can  
13 be achieved through some cleansing or cleaning of the  
14 Plaintiffs' homes in particular. Accepting for purposes  
15 of this argument your hypothetical --

16 THE COURT: Well, isn't that just damages? I  
17 mean, can't you very well say, listen, we have our --  
18 we're going to call our next witness and our next witness  
19 is a expert in environmental clean-up. And -- and this  
20 person comes on the stand and you have him testify to the  
21 fact that it's going to take a certain procedure and  
22 certain operations and construction, remediation in a  
23 client's home in order to purify it, if you would,  
24 cleanse it from the contamination and stop it from  
25 happening again at that location, whether it's valves,

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1 check valves on sewer systems or I don't know what it  
2 would be. Again, we're not in that area. And that could  
3 be related to a dollar figure; dollars and cents, right?

4 MR. MACK: It could. But your Honor, we don't  
5 think that our clients should have to undertake the  
6 responsibility to clean their homes of something they  
7 didn't put there in the first place.

8 THE COURT: Well, but your -- your -- your  
9 complaint speaks to the distress that is -- is afforded  
10 all of these Plaintiffs because the government just  
11 doesn't get it right. They're continuing to provide for  
12 this migration of toxic waste. They misinformed and lied  
13 to these people. And now you're going to want them to  
14 come into their homes and construct some type of  
15 containment system or remediation project in the home?

16 I -- do they really -- is that really a way of  
17 handling these suits?

18 MR. MACK: Well, I think that the precise way  
19 that the homes can be sufficiently abated will become  
20 clear as the litigation proceeds and as we hear expert  
21 testimony. And to the extent your Honor seems to be  
22 concerned about the presence of the EPA or the DEC --

23 THE COURT: Well, there is a consent judgment.

24 MR. MACK: Yes.

25 THE COURT: And -- and one of the -- the part

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1 -- a number of the parties here are parties to that  
2 consent judgment.

3 MR. MACK: Yes. And -- and to the extent that  
4 the involvement of the EPA or DEC would be implicated by  
5 the, you know, appropriate abatement of our clients'  
6 homes, that may very well be beyond the jurisdiction of  
7 this Court and we're not asking the Court to go there.

8 THE COURT: Well, that's the -- that's the --  
9 that's right -- we're there. That's the million dollar  
10 answer.

11 MR. MACK: But that's --

12 THE COURT: It's beyond the jurisdiction of  
13 this Court.

14 MR. MACK: And that's why we made that  
15 concession in our papers and we're not asking the Court  
16 to go there. If -- if the DEC and the EPA decide, and we  
17 think they should, to take a look at the containment  
18 system as a matter of their public obligations to protect  
19 the community that they're charged with doing, that's  
20 something that they should do.

21 You know, I think we've conceded in our papers  
22 we can't force them to do that here in this court and  
23 that's not what we're asking for. We're merely asking  
24 for our clients' homes to be cleaned.

25 THE COURT: Well, you're asking for the

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1 Defendants here to abate the nuisance, the migration.  
2 And it may very well throw them into conflict with a  
3 consent judgment that is in existence and is a reality.  
4 That's why it should be in a location that can deal with  
5 it effectively.

6 And I know -- you know, I wonder why Judge  
7 Curtin would not keep it. Then as I read his decision,  
8 the one particular part where -- let me see if I can find  
9 it quickly. Even -- page sixteen of his decision: In  
10 any event, as discussed, CERCLA does not completely  
11 preempt Plaintiffs' nuisance or trespass claims or  
12 otherwise foreclose Plaintiffs from relying on common law  
13 theories for the relief they seek. He's saying money  
14 damages. You can get money damages. You can deal with  
15 this.

16 There's no indication that EPA is unhappy with  
17 the containment system. It's working properly. This  
18 federal defense, as he calls it, can be raised to deal  
19 with the state law claims. So, you know, but if I'm  
20 wrong, if the Plaintiffs are correct, then money damages  
21 can deal with this.

22 So, why do we need an equitable relief stated?  
23 Why do we even need it? Why don't we just strike it? If  
24 you want -- if you can prove your damages, you should  
25 prove them and get -- get your -- your damages in money

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1 form.

2 MR. MACK: Well, your Honor, in that  
3 circumstance -- one problem that comes to mind with that  
4 circumstance is that our clients are merely private  
5 citizens who may not have the technical wherewithal to  
6 receive an amount of money damages and then know what to  
7 do with it in order to make their homes safe. Whereas  
8 the Defendants, many of them possess a lot of technical  
9 know-how. And if -- if, you know, they're forced to  
10 render our clients's home safe, then they're in a much  
11 better position to do this than we are. That's -- that's  
12 why money damages would be insufficient.

13 THE COURT: But your complaint goes paragraph  
14 and paragraph indicating that the problem is the  
15 containment system, is a continuous migration of toxic  
16 waste from the Love Canal. Paragraph ninety: Defendants  
17 were also otherwise negligent in the design,  
18 implementation and construction of infrastructure in  
19 connection with the Love Canal remediation.

20 Paragraph ninety-seven: Thus, upon information  
21 and belief, the remediation program did not prevent the  
22 toxins within the -- within the Love Canal containment  
23 area from spreading throughout the Love Canal  
24 neighborhood from the time of its inception up to and  
25 including the present day, right now as we speak. If

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1 you're right, they're continuing to provide for migration  
2 into the neighborhood.

3 One twenty-five: Love Canal toxins should not  
4 have been present in the area sewer lines to begin with,  
5 particularly because -- and then going down to  
6 subparagraph two -- Defendant should have discharged  
7 their duties to adequately remediate and/or contain such  
8 materials within the Love Canal containment area from the  
9 time of the original Love Canal clean-up and continuing  
10 to the present date.

11 Paragraph one thirty-eight and one  
12 thirty-nine: Although both state and federal authorities  
13 ordered the Love Canal area to be environmentally  
14 remediated, at present times the toxins that Defendant  
15 Occidental slash Hooker wrongfully dumped on the site  
16 continue to escape from the Love Canal containment area  
17 and systemically invade the adjacent neighborhoods,  
18 including the homes of Plaintiffs.

19 The original Love Canal remediation thus was  
20 insufficient and/or negligently performed by Defendants  
21 insofar as such remediation did not prevent the continued  
22 escape of chemicals from the site. Everything in your  
23 complaint points to the failure of the containment  
24 system, which is part of the consent judgment and which  
25 this Court really, as you just indicated earlier, does

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1 not have jurisdiction over.

2 Why should we deal with that part or that  
3 relief sought in this Court?

4 MR. MACK: Well --

5 THE COURT: Get thee to federal court.

6 MR. MACK: Well, your Honor, again, the -- the  
7 provisions in paragraphs from the first amended complaint  
8 that the Court has referred to are -- are meant to  
9 illustrate the systemic ongoing problem in this community  
10 going to the public health. And, you know, yet at the  
11 same time, again, there's no specific request in the  
12 complaint for any modification to that containment  
13 system, whatever we think about it. We don't think it  
14 works, but we're not asking you to do anything.

15 THE COURT: You asked for abatement of the  
16 nuisance -- of the nuisance.

17 MR. MACK: Of our clients' homes, which has  
18 nothing to do with the containment.

19 THE COURT: It doesn't say that. I can read  
20 your complaint here. Addendum clause -- and I believe  
21 that -- Mr. Hogan, do you have it at your fingertips?

22 MR. HOGAN: Well, Judge, it's found in a  
23 variety of places, but I don't think it's necessarily in  
24 the addendum clause.

25 THE COURT: I'll get it quickly here.

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1 MR. HOGAN: You're --

2 MR. FLEMING: Paragraph six, your Honor --

3 THE COURT: I'm trying to find the actual --

4 MR. FLEMING: -- states an abatement with  
5 contamination within, around and under their properties.  
6 Paragraph one sixty-nine G alleges that the Defendants  
7 were negligent for taking no action to abate or otherwise  
8 stop the pollution and contamination of the surrounding  
9 area.

10 It seems to me Plaintiffs can't have it both  
11 ways. They can't come in and complain that the entire  
12 landfill containment system is failing and then say,  
13 well, you know what, we really only want an abatement of  
14 our property. I mean, if their whole claim, the whole  
15 premise of their case is that -- of this chronic exposure  
16 case is that the source is coming from the Love Canal  
17 containment, how can you abate their property only?

18 THE COURT: You, of course, are saying it more  
19 eloquently than me. I found the part of the addendum  
20 clause saying each of the Plaintiffs separately demands  
21 equitable relief in the form of the establishment of a  
22 fund or trust to appropriately achieve such medical  
23 surveillance. Okay, fine, abatement and study. And  
24 there's no limitation on that request for abatement.

25 MR. FLEMING: That's right, your Honor. Again,

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1 it's very curious that Plaintiffs make these sensational  
2 charges in this case, in the press. And if they're going  
3 to come in and claim that the Love Canal containment  
4 system is failing --

5 THE COURT: Which they have factually.

6 MR. FLEMING: -- causing an ongoing public  
7 health catastrophe in the neighborhood of tens of  
8 thousands of people, why is it they don't want the EPA  
9 here to deal with that claim? Why is it? And you  
10 haven't heard an answer to that question. I had my  
11 suspicions about it. But the EPA needs to be here if  
12 they're going to make those kinds of claims and I think  
13 your Honor is exactly correct.

14 THE COURT: They need to be involved.

15 MR. FLEMING: Correct.

16 THE COURT: They don't need to be here.

17 MR. FLEMING: They can't be here. They need to  
18 go to federal court. They need to be in these  
19 proceedings.

20 MR. MACK: Your Honor, the EPA is fully aware  
21 of what's going on here and of the allegations that we've  
22 made. And it's incumbent upon them to act, should they  
23 choose to do so, in -- in furtherance of their duties  
24 toward the public health. We think they should.

25 The -- and the other point I'd like to make,

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1 Judge, is that indeed I think if we were to drill down on  
2 the -- the -- what is this, the ROD, it -- it certainly  
3 is the case that much of what we're dealing with here is  
4 beyond the ROD. I don't have precise citations for you  
5 here as we stand here today. But.....

6 THE COURT: Well, you know, I think it's self  
7 evident that -- how I feel about that. So, Mr. Hogan,  
8 your motion -- and the other parties, the motion is  
9 granted to the extent of striking. And I'm going to try  
10 to be a little precise in this language. Maybe you can  
11 draft it up better. Because I know there will be a  
12 dispute over the order, unfortunately.

13 But motion is granted to the extent of striking  
14 the request of the equitable relief of abatement. In any  
15 other respects, the motions in that area are denied.

16 Okay. All right. Now, while we're dealing  
17 with this, no -- no objection to the loss of consortium  
18 claim of minor child, not recognized in the state. The  
19 loss of consortium claims for the minor child -- minor  
20 child.

21 MR. MACK: Non-pecuniary.

22 THE COURT: Well, any consortium claim. When  
23 you say non-pecuniary, what do you mean?

24 MR. MACK: I'm talking about pecuniary loss of  
25 services.

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1 THE COURT: Yes.

2 MR. MACK: Yeah.

3 THE COURT: Yeah. The lost consortium claim is  
4 -- is -- is not recognized in the state, you would  
5 concede that.

6 MR. MACK: We do, your Honor.

7 THE COURT: Okay. So, that, as well, is  
8 granted.

9 Okay. Now, let's with that -- I think, Mr.  
10 Hogan, that expresses your full request, right? Cecos has  
11 some additional, we'll deal with that in a while.

12 MR. HOGAN: No, there was more to our motion.

13 THE COURT: What else?

14 MR. HOGAN: Our motion also sought to dismiss  
15 the complaint. The lost consortium portion was the last  
16 of the, say, four or five --

17 THE COURT: Well, that's granted.

18 MR. HOGAN: -- grounds. We sought from the  
19 Court the dismissal of the complaint for its failure to  
20 include allegations that specifically advise each  
21 Defendant of the harmful or negligent conduct.

22 THE COURT: That's why I denied that. I think  
23 it's sufficient. You know what they're claiming. You  
24 know what their claim is. Certainly in regard to the  
25 acute exposure, they're saying on January 11th --

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1       although I wonder about that. What exactly happened when  
2       the sewer work was being performed? Did substances ooze  
3       up and spill out and go running down the street?

4               MR. HOGAN: Well, their complaint contains some  
5       allegations of that type. To give you just --

6               THE COURT: Well, then, you know what they're  
7       talking about.

8               MR. HOGAN: Well, that's right, Judge. To give  
9       you some history here, this lawsuit commenced with a  
10      complaint that only contained the acute exposure claims  
11      related to that.

12              THE COURT: I understand that.

13              MR. HOGAN: And there was no motion to  
14      dismiss. And then after some new counsel were  
15      substituted, a motion for leave to amend to raise the  
16      chronic claims was added. And it's in the face of that  
17      that the motion to dismiss is brought.

18              And the motion to dismiss is really targeting  
19      the lumping together. Remember we went from four  
20      Defendants to fifteen Defendants and from a two-month  
21      period of conduct to a four or five-decade period of  
22      conduct, without any allegations identifying Glenn  
23      Springs, what did you do wrong. In fact, there's only  
24      two allegations that refer to Glenn Springs, its  
25      corporate affiliation and its assumption of the

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1 monitoring obligations.

2 THE COURT: Mr. Hogan, as I sit here now, how  
3 do I know that they're not correct, even though they  
4 won't go to federal court and litigate it, that the  
5 containment system as designed and implemented and  
6 monitored is not ineffective? How do I know that?

7 MR. HOGAN: And they have a right to come here  
8 and prove it. And you and I and I don't think anyone  
9 else here knows whether they will be able to do that or  
10 not.

11 What we have the right to, though, is a better  
12 pled complaint, a complaint that says Glenn Springs, this  
13 is what you did, Cecos, this is what you did, Severson,  
14 this is what you did. But not one that says it's -- it's  
15 a res ipsa loquitur-esque, we claim the landfill is  
16 failing. We claim to have been exposed and we've  
17 identified fifteen Defendants. But we are stopping short  
18 of identifying what each Defendant has done wrong.

19 THE COURT: Well, as far as your corporate  
20 entities who have been around longer than God, you know,  
21 you -- it's not a problem.

22 MR. HOGAN: Only -- and you know, to the extent  
23 that the complaint contains an allegation that Occidental  
24 disposed of waste in that landfill in the forties and  
25 fifties, I'm not saying that those allegations are

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1 insufficient. But that's the only Defendant of the  
2 fifteen that has an actual allegation of harm --

3 THE COURT: Well, I agree with you as far as  
4 the chronic.

5 MR. HOGAN: -- or harmful conduct.

6 THE COURT: Let's deal with Scott Lawn. Let's  
7 deal with Scott Lawn Yard.

8 Was Scott Lawn involved with the chronic  
9 exposure? Weren't they just involved in the sewer?  
10 Shouldn't they be involved only purely, solely on the  
11 acute case? What are they doing here for chronic? Scott  
12 Lawn didn't dump any toxic waste in there, did you, sir?

13 MR. SUTTER: No, your Honor.

14 THE COURT: You weren't involved with the  
15 construction of the containment system, were you?

16 MR. SUTTER: And also, the allegation --

17 THE COURT: Were you?

18 MR. SUTTER: No.

19 THE COURT: Were you a party to the consent  
20 judgment that provided for the containment system?

21 MR. SUTTER: No, sir.

22 THE COURT: Do you monitor the waste that's  
23 taken annually or how -- periodically that's taken from  
24 that?

25 MR. SUTTER: No, sir.

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1 THE COURT: Why don't you clean it up and say  
2 we're looking at Scott Lawn purely and simply in regard  
3 to the acute exposure?

4 MR. MACK: Well, your Honor, I think that the  
5 complaint is clear. Our allegation, we specifically say  
6 in the complaint using Scott Lawn and Yard as an example,  
7 Scott Lawn and Yard was involved in the -- I'm not going  
8 to quote it properly, but in the, you know, remediation  
9 of the 2011 event or something like that. And it's clear  
10 from the face of the complaint what their involvement  
11 is. And we're looking to them for that conduct.

12 THE COURT: So, you're saying you're only  
13 looking at them for the acute incident -- instance.

14 MR. MACK: Yeah, I think the complaint is clear  
15 on that.

16 THE COURT: Well, that's -- and that's why I  
17 didn't take it, Mr. Hogan, is it -- could there be a  
18 better complaint? I mean, somebody can say it's -- I  
19 wouldn't say it -- but unartfully drawn. It could be  
20 drawn a little better. That's why I avoid written  
21 decisions, so that people can't say the same thing about  
22 me.

23 I mean, come on. It's okay. It tells you what  
24 it's about. I can figure it out. Scott Lawn, you know,  
25 you guys were involved with the sewer work. If there was

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1 an acute exposure, I -- I would love to know about that.

2 Did things come bubbling up out of the ground  
3 and go running down the street? You were shaking your  
4 head before. Is that what happened?

5 MR. MACK: Yes, your Honor.

6 THE COURT: What was in this ground? What was  
7 -- is it under some force that it came bubbling up? I  
8 cannot picture it.

9 MR. HOGAN: From -- from twenty feet below.

10 THE COURT: Did it?

11 MS. MORRIS: Yes.

12 MR. MACK: Yes, Judge.

13 THE COURT: They say yes.

14 MR. HOGAN: I don't think so.

15 MR. SUTTER: Judge, if I may, the complaint  
16 also alleges that my clients misrepresented the nature of  
17 the toxins in the Love Canal. Come on. It says that as  
18 a result of my --

19 THE COURT: Well, wait a minute. They didn't  
20 do that, did they?

21 MR. MACK: Your Honor, I -- what -- what  
22 paragraph is counsel referring to?

23 MR. HOGAN: There are six actual paragraphs  
24 where no single Defendant is identified and instead the  
25 term Defendants is used --

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1 THE COURT: Defendants.

2 MR. HOGAN: -- six times. The complaint refers  
3 to fraud, false statements, misrepresentation. Now,  
4 granted, this is a special aspect of the motion because  
5 of 3016 B, but it's an example. This goes beyond just  
6 the inartful pleading. And the CPLR insists on an even  
7 higher standard.

8 THE COURT: But I figure we could always flesh  
9 that out post depositions.

10 MR. SUTTER: But, Judge, here's why it  
11 matters --

12 THE COURT: I would hope you guys would flesh  
13 that out in the normal life of a lawsuit.

14 MR. SUTTER: But --

15 MR. MACK: This is what bill of particulars are  
16 for, in our opinion. We're fully prepared to respond  
17 promptly for requests for BPs.

18 MR. SUTTER: Here's where it matters, Judge.  
19 Apparently, there have been maybe eleven hundred notices  
20 of claim filed in this case. Is my client going to get  
21 sued eleven hundred times? And all of those clients, all  
22 of those Plaintiffs are going to claim that my client  
23 misrepresented to them what was in the Love Canal? It --  
24 it just can't be alleged in good faith. It can't be.

25 THE COURT: From what I hear here eventually,

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1 you know, you're going to have that relief. I don't know  
2 if now is the time. And for everybody across the board,  
3 I would hope, again, that you could flesh that out. Are  
4 you going to be served -- sued eleven hundred times for  
5 the acute exposure? Maybe.

6 MR. SUTTER: But the thing is, Judge, I think  
7 that as -- I think the complaints have to make good faith  
8 allegations. For example, of the eleven hundred, how  
9 many of them are within I don't know what distance from  
10 this pipeline project we were involved in? I mean, they  
11 make claims in here that the -- the Plaintiffs have  
12 suffered birth defects as a result of the -- how many of  
13 them were born since 2011?

14 THE COURT: Well, they can't be -- put that  
15 into a pleading, the pleading would be --

16 MR. SUTTER: But you can allege --

17 THE COURT: -- huge.

18 MR. SUTTER: But you can allege what each  
19 Defendant did and that's all we're asking for, rather  
20 than lumping us with Mr. Hogan's clients.

21 MR. HOGAN: Judge, one other point.

22 THE COURT: How quickly friends drop off.

23 MR. HOGAN: You don't see him sitting up here  
24 with me.

25 MR. SUTTER: Casting no aspersions.

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1 MR. HOGAN: But the bill of particulars point  
2 is one that the legislature sought to differentiate  
3 between misrepresentations and fraud and all of the other  
4 complaints that the Defendants have -- have raised. The  
5 Defendants raise the complaint that they lumped all the  
6 Plaintiffs together and we don't know whether only one or  
7 all the Plaintiffs or some number in between has actually  
8 incurred any injury. We don't know what any of the  
9 conduct of the Defendants specifically was that was  
10 negligent. We don't know when, how or where any  
11 Plaintiff was exposed.

12 But putting those aside, the legislature  
13 probably agreed with Mr. Mack about his point about at  
14 some point, Defendants, a bill of particulars is how  
15 you're going to flesh out the additional detail.

16 THE COURT: Exactly.

17 MR. HOGAN: But the legislature said but  
18 misrepresentation and fraud is a different species. And  
19 in that case, the bill of particulars isn't enough.  
20 We're going to -- we're going to -- that's a special,  
21 special kind of pleading.

22 THE COURT: Okay. What about it, Mr. Mack? If  
23 I were to grant that relief, all you have to do is draw a  
24 new pleading and maybe do it a little more carefully to  
25 exclude people like Roy's Plumbing, Scott Lawn. Who else

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1 was involved only in the acute exposure?

2 MS. CICCARELLI: Your Honor, actually, if I  
3 could be heard, and I will be very brief.

4 THE COURT: Who do you represent again?

5 MS. CICCARELLI: I have Gross PHC. So, I -- I  
6 agree with everything Kevin said and everything Brian  
7 said. And I think the allegations as against my client  
8 really speak the loudest to the fact that the complaint  
9 does not tell any of us what we did wrong.

10 Gross PHC, your Honor, did not exist at the  
11 time of the 2011 remediation project. I added the  
12 documents that your Honor --

13 THE COURT: Stop right there. Doesn't that by  
14 itself speak to the fact that they should be clearly told  
15 that they're only involved -- how were you involved in  
16 the acute case?

17 MS. CICCARELLI: Well, I could not possibly  
18 have been. I mean, I think I can represent that to the  
19 Court, just as I -- again, I didn't exist. There's  
20 allegations as to the 2011 project, I didn't exist.

21 And then with respect to presently sewer --  
22 there's an allegation that certain companies presently  
23 service the homes in the Love Canal area, so I may or may  
24 not fit in there. But I have no idea. How would I know  
25 that?

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1 I don't know that with these particular  
2 Plaintiffs my client serviced their homes. And I think  
3 that is an absolute needed piece of information because  
4 you cannot drag us through eleven hundred lawsuits if we  
5 only serviced maybe two homes.

6 THE COURT: Okay. And there are other hands in  
7 regard to only the acute. Who do we have?

8 MR. BAASE: Your Honor, the water board didn't  
9 exist.

10 THE COURT: We're going to get to the water  
11 board. The water board has its own separate motion.  
12 We'll get to the water board.

13 MR. BAASE: But for purposes of this motion,  
14 your Honor, the water board didn't exist prior to 2002.

15 THE COURT: I realize it didn't. Yeah. And --  
16 and, you know, of course we've had so many water board  
17 lawsuits over the years and I know by itself the  
18 originating language between the city and the water  
19 board, there was a lot of language that's been well  
20 litigated in regard to responsibilities and ownership for  
21 prior alleged torts and negligent claims. I don't know  
22 how that even frames into this.

23 MR. BAASE: Those are all issues that we will  
24 probably get to at some point in this case, Judge.

25 THE COURT: Okay. So, I know that's very

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1 complicated. But I know -- when I first read, when I  
2 first picked it up and looked at the title, I said the  
3 water board didn't even exist.

4 Who else was involved in only the acute?

5 MR. SCHULMAN: Op-Tech Environmental.

6 THE COURT: Okay. Shouldn't they be -- you  
7 know, shouldn't there be a pleading that -- that -- I  
8 know it takes a little bit more time, but it's honest,  
9 it's truthful. I mean, they weren't involved in the  
10 chronic exposure. How could they be?

11 How was Roy's Plumbing? I mean, if you -- the  
12 only way you can make it any worse is if it was Bob's  
13 Plumbing. How's Roy's Plumbing involved in the Love  
14 Canal chronic exposure?

15 MR. MACK: Well, your Honor, Roy's and Gross,  
16 to use your examples, Judge, we believe were involved in  
17 an ongoing basis on work in the area. So, I can't say as  
18 we stand here today that their only involvement was  
19 relating to the January release of chemicals. And I  
20 can't know what these Defendants were doing operationally  
21 and technically.

22 THE COURT: Well, then they're right. Because  
23 they don't know what to defend against.

24 MR. KNOER: Your Honor, this is the first I'm  
25 hearing this might be a possibility. That shows the



1 reason why we need this.

2 THE COURT: One second. Just think of what you  
3 said. We think that they were doing other work in the  
4 area. Where? What type of work?

5 MR. MACK: It says it --

6 THE COURT: Wait a minute. What type of work?  
7 At some other project on the other side of town?

8 MR. MACK: No, your Honor.

9 THE COURT: Working in this home putting in a  
10 sink?

11 MR. MACK: Your Honor --

12 THE COURT: Or cleaning out this drain over  
13 here? You got to give them an opportunity to defend  
14 themselves.

15 MR. MACK: Your Honor, I'm referring to what it  
16 says in the first amended complaint, which is work  
17 relating to the sewer remediation project. It says that  
18 right in the complaint.

19 THE COURT: Well, what part of it? Are you  
20 talking about the annual -- the containment system?

21 MR. MACK: That ultimately resulted in the  
22 January 2011 release of chemicals. So, I'm not  
23 understanding the distinction you're making between --  
24 you know, where you're drawing the line between chronic  
25 and acute.

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1 THE COURT: Where are you drawing the line  
2 between chronic and acute?

3 MR. MACK: Well --

4 THE COURT: Chronic means that there's ongoing  
5 contamination that's leaching from the system, migrating  
6 into the area. And the acute exposure is the traumatic  
7 event that was caused by somebody opening up a sewer and  
8 allowing waste to flow everywhere and not cleaning it up  
9 properly. It's very -- to me it's pretty simple.

10 If an acute exposure happened, I would think  
11 that there's liability here, okay. If an acute exposure  
12 happened where contaminated waste, documented waste  
13 flowed into the neighborhood and was not properly  
14 cleaned, there's got to be some environmental impact.  
15 Has to be.

16 Now, but chronic, particularly when the -- the  
17 references in the -- in the Curtin decision indicates  
18 that EPA feels that the containment system is working  
19 just absolutely fine, terrific, and you haven't sued  
20 alleging differently. So, I assume that Curtin is  
21 correct, as he normally is, by the way. Maybe they're  
22 right.

23 I'm not issuing a decision other than the --  
24 the equitable claim, because I think that -- and the loss  
25 of consortium and we'll get to some of the municipal

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1 claims. But as to all the other request for dismissals  
2 for failure to state, I reserve on that, okay.

3 So, I'll change from denial to reserve and I'll  
4 take a look at those.

5 MR. HOGAN: Thank you, Judge.

6 MR. SUTTER: Thank you, your Honor.

7 MR. FLEMING: Thank you, your Honor.

8 THE COURT: With that let's shift gears a  
9 little bit. That means I'm going to have to write, which  
10 is always very dangerous. Let's switch and go to the  
11 city's motion.

12 MR. HOGAN: Would you like us to let Tom and  
13 Jeff come up?

14 MR. JANESE: Judge, I'm comfortable staying  
15 here.

16 THE COURT: He's very comfortable there. Let  
17 me -- the -- let's first of all put -- put aside the  
18 infants' claims, which are tolled by statute. You got  
19 all the time in the world. So, we're only dealing with  
20 the adult claims and their notice of claims. And as I  
21 understand and as from my analysis, the notice of claims  
22 in regard to the acute exposure were timely.

23 MR. JANESE: Yes, Judge, that's correct.

24 THE COURT: And let's assume using the  
25 operation of the statute and when any harm was caused in

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1 regard to the latent effect of the chronic exposure that  
2 I determine them to be timely.

3 MR. JANESE: Okay.

4 THE COURT: Okay. You filed a notice of claim,  
5 or prior counsel did, there was a 50-H hearing scheduled,  
6 and Plaintiffs failed to appear. Isn't that -- isn't  
7 that fatal, unless you have a real good reason? I mean,  
8 it should be fatal.

9 I mean, now the -- the city has no right that  
10 the statute gives them, that the legislature carved out  
11 and said, listen, you can sue the king, but you're going  
12 to do it under our rules. And part of the rules are you  
13 got to file the notice of claim and that they have a  
14 right to a 50-H hearing. Isn't that fatal by and of  
15 itself?

16 MR. MACK: Well, no, your Honor. At this point  
17 the 50-H hearing has been previously litigated before  
18 Judge Murphy. The City of Niagara Falls made a motion in  
19 that court on 50-H grounds, we opposed that motion. Our  
20 predecessor counsel was involved in that portion of the  
21 litigation. They made the motion, we opposed it.

22 THE COURT: Is that true?

23 MR. JANESE: It is, Judge.

24 THE COURT: Well, then --

25 MR. JANESE: But Judge, this was in the

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1 original complaint prior to this current complaint, the  
2 amended complaint. And we sought to appeal that  
3 decision, Judge, and were stayed only because we went up  
4 to federal court and ended up back here. So, in order to  
5 preserve it, we had to -- we had to --

6 THE COURT: I'm not going to set aside a  
7 parallel court here. I'm not going to come in -- I  
8 didn't ride in with the intent of overturning Judge  
9 Murphy's prior decisions in this lawsuit.

10 If he issued a decision in regard to the first  
11 complaint that was filed and did not buy your argument on  
12 50-H, I don't know why he wouldn't, but I would have,  
13 and you're appealing it, then -- then the matter has been  
14 decided. Follow through on your appeal.

15 MR. JANESE: Okay.

16 THE COURT: So, to that extent, I dismiss the  
17 -- your motion as being, you know, moot, really.

18 MR. JANESE: Okay.

19 THE COURT: Okay. Let's bring up the water  
20 board now. And Mr. Baase, why don't you -- would you  
21 flesh out for me what exactly -- what -- you're claiming  
22 that it was premature, the filing?

23 MR. BAASE: Your Honor, actually, I spoke with  
24 Mr. Mack a week or two ago. We moved in the Pierini  
25 case.

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1 THE COURT: Yes, I got -- that's what I'm  
2 referring to.

3 MR. BAASE: Yeah, 50-E and 50-I issues. And I  
4 didn't get Bill's responding papers, so I called him up  
5 and asked about it. There was a misunderstanding because  
6 some of the other Pierini motions, there was an agreement  
7 to put those motions off until we get a decision in  
8 Abbo-Bradley. So, I think he thought that that was going  
9 to be heard -- this motion was going to be heard with  
10 those motions, so he didn't put in opposition.

11 THE COURT: So, we're adjourning the Pierini  
12 motion.

13 MR. BAASE: Yeah, I think we're adjourning all  
14 that. And your Honor, we'd like to call and get a date.

15 THE COURT: Before you leave make sure you stop  
16 up and talk to my clerk and get a date.

17 MR. MACK: Mr. Baase and I had discussed this  
18 and we're going to be speaking about return dates and  
19 will coordinate with the Court.

20 THE COURT: Okay. So, does anybody else want  
21 to be heard, then?

22 So, let's -- let's just summarize this. The --  
23 the equitable reliefs are -- are granted. The other --  
24 the consortium claim is granted. The -- all other issues  
25 outside of the sufficiency of the pleadings for all

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1 parties --

2 MR. HOGAN: Reserved.

3 THE COURT: -- denied as to the sufficiency of  
4 the pleadings, I reserved on that. Okay.

5 MR. EGGERT: Your Honor, there is an issue with  
6 respect to Cecos.

7 THE COURT: Yes.

8 MR. EGGERT: Which is not the acute exposure,  
9 it's the chronic exposure. Because the allegations  
10 against Cecos are that it was involved in an early phase  
11 in the 1978, '79 remediation of Love Canal.

12 And we've argued on two grounds, really. The  
13 first is as a tactical decision, another tactical  
14 decision of the Plaintiffs made to get back into this  
15 court, in their remand papers they told Judge Curtin that  
16 they weren't challenging the construction, design or  
17 planning of that early remediation.

18 Well, that's Cecos' only involvement here. So,  
19 if that's not in this case, neither is Cecos.  
20 Conversely, if it is in this case, then EPA should be.  
21 And we go right back to where we were forty-five minutes  
22 ago.

23 So, one way or the other, either we can't be in  
24 this court or we have to be in federal court because  
25 we're challenging the 1978 remediation.

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1 THE COURT: Okay. And that was unclear to me.  
2 So, you -- Cecos was involved only in the design part of  
3 the containment system.

4 MR. EGGERT: The construction.

5 THE COURT: The construction.

6 MR. EGGERT: Was -- was a construction  
7 contractor for some of the containment at the very south  
8 end of Love Canal, the first phase. It was an  
9 unsuccessful bidder for later phases.

10 THE COURT: I'm sorry to hear that. And  
11 weren't involved in the acute exposure.

12 MR. EGGERT: No.

13 THE COURT: Okay. What do you have to say to  
14 that?

15 MR. MACK: Well, your Honor, we don't know what  
16 operational conduct Cecos is responsible for as we stand  
17 here today. The -- this --

18 THE COURT: Can I stop you there?

19 MR. MACK: Yes.

20 THE COURT: But if he's correct and all they  
21 were involved in is the containment system and you're  
22 fighting challenging the containment system because you  
23 don't want to go to federal court for some reason, isn't  
24 he right?

25 MR. MACK: No, Judge, because we're not

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1 attacking the containment system itself in this  
2 proceeding. But that doesn't answer the question of  
3 whether there were certain operational failures that  
4 don't --

5 THE COURT: With the containment system.

6 MR. MACK: -- that don't go to the design  
7 implementation. Cecos was also involved in the clean up  
8 of the sewers according to our investigation.

9 MR. EGGERT: Well, that's news to Cecos. If  
10 they want to allege that with specificity, fine.

11 But we're talking about Love Canal. Nobody is  
12 writing on a blank slate here. All you have to do is  
13 look at the public record and you can tell who did what  
14 pretty clearly. If they want to claim that, fine. We'll  
15 be seeking damages probably for bad-faith pleading. But  
16 if they -- they can certainly allege that. They  
17 haven't.

18 If you look at the complaint, Cecos is  
19 mentioned three times, all in conjunction with the 1978,  
20 '79 work. Nothing else. So, either we have to be out  
21 of here or EPA has to be here with us. But either way,  
22 it can't stand the way it is now.

23 THE COURT: Okay. Anything in response to  
24 that, sir?

25 MR. MACK: Merely to reiterate my prior

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1 position, your Honor.

2 THE COURT: Okay.

3 MR. MACK: That operational failures are and  
4 technical failures are different than attacking the  
5 design of the remediation itself.

6 THE COURT: I'll reserve on yours, I'll give  
7 you a written decision on that.

8 MR. EGGERT: Thank you, your Honor.

9 THE COURT: Mr. Adams, you want to say  
10 something else?

11 MR. ADAMS: Briefly, your Honor.

12 THE COURT: You're uncommonly quiet. I thought  
13 we were going to get out of here lucky, but no.

14 MR. ADAMS: As Cecos rules, apparently so do  
15 Severson. We had the same role they had. We were a  
16 contractor. We were shovels and --

17 THE COURT: Well, contractor doing what?

18 MR. ADAMS: In the original remediation, as  
19 were they. We were involved -- we did win some more  
20 bids, but we did the same thing. We were involved in  
21 implementing the plan that was set forth by EPA and DEC.  
22 We were not involved in the design. We were simply  
23 shovel and pick. We went in and did the work we were  
24 told to do.

25 If they're not challenging the -- that the

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1 system was adequate, where are we in this? We didn't  
2 have anything to do with the design. All we did was  
3 implement what we were told to do. We were a contractor.

4 MR. MACK: And again, their operational  
5 failures are -- are very much relevant to this case. And  
6 Severson continues to be involved, my understanding is,  
7 to this day over the last --

8 THE COURT: With what? With what?

9 MR. MACK: With --

10 THE COURT: You see, that's the problem.  
11 You're saying they're involved to this day, then you drop  
12 it off there. And the problem is involved with what?  
13 Involved with the construction activity, the sewer work  
14 that occurred on January 11? Involved with the  
15 monitoring aspect of the containment system that you are  
16 not contesting? Because if it's the -- if it's the  
17 latter, there's no cause of action against them. If it's  
18 the former, there might be.

19 So, you can't just say they're still involved  
20 with operational aspects and leave it there. You got to  
21 define what the operational aspects is. And from what I  
22 understand from the Defendants, that's pretty much why  
23 they feel your pleadings are lacking and they're trying  
24 -- they're trying to convince me because they don't  
25 flesh out exactly what you're claiming.

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1 MR. MACK: Your Honor, with respect to  
2 Severson, we believe this Defendant has been involved in  
3 remedial environmental activities at least over the last  
4 three years. And you know, all these parties are  
5 involved in Love Canal work, many of them to this day.  
6 And we can't know as we stand here on a motion to  
7 dismiss, you know, your role was this, this other  
8 Defendant's role was that.

9 THE COURT: But that's unfair. Because what  
10 you're doing is you're causing the Defendants to go into  
11 a litigation and to bear the expense of this when you're  
12 not sure, you're just hunting.

13 MR. MACK: But no, Judge, I'm forced. When New  
14 York moved from joint and several liability to several  
15 liability, if I don't include somebody that has to be  
16 here, I have to stand here and defend an empty chair.

17 THE COURT: Or you can do your work before  
18 suing people.

19 MR. MACK: We did -- we did, Judge. And that's  
20 -- you know, and if -- if there are Defendants that have  
21 valid arguments for why they shouldn't be here, they  
22 should call me and we'll talk about this and we don't --  
23 we don't --

24 THE COURT: Your phone will be very busy the  
25 next few days.

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1 MR. MACK: Judge, we don't have any interest in  
2 having people here that don't belong here. In fact,  
3 we've dismissed one Defendant and we're in the process of  
4 voluntarily dismissing a second Defendant because we had  
5 such conversations.

6 THE COURT: Well, I'll give you thirty days  
7 before I issue a decision to clean up the stuff on your  
8 own. Then I'll start issuing decisions. How's that?

9 MR. PEREL: Nelson Perel for Cecos. I just  
10 point out there's no dispute Cecos's only involvement was  
11 in the early days. Everybody knew about Cecos at the  
12 time. Everybody knew about the early work. You had all  
13 these lawsuits --

14 THE COURT: You know what, I put yours off to  
15 the side because I couldn't figure it out. That's why I  
16 really needed to take oral arguments. I was saying to  
17 myself, why exactly are these guys in this?

18 MR. PEREL: There were thousands of lawsuits  
19 brought in the eighties, nineties and early two thousands  
20 by Plaintiffs, sophisticated counsel. They knew Cecos  
21 was out there. Not a single lawsuit against Cecos.

22 THE COURT: Try to clean it up. If not, I'll  
23 issue a decision. Anybody else needs to be heard?

24 MR. MACK: Just to clarify, your Honor, we have  
25 thirty days to re-plead the complaint; is that what your

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1 order --

2 THE COURT: Well, if you re-plead the  
3 complaint, I think everybody would be overjoyed. Some  
4 would. Some maybe wouldn't. No.

5 MR. PEREL: No, we want out, your Honor.

6 THE COURT: Well, you may be out. That's --  
7 that's what re-pleading means, maybe refining it and  
8 sending the right people out the door.

9 You can do whatever you want to clean it up. I  
10 would suggest you would. You're a bright guy. All  
11 right.

12 MR. MACK: Thank you, Judge.

13 THE COURT: We'll see you.

14 MR. HOGAN: Judge, thanks very much.

15 (PROCEEDINGS CONCLUDED.)

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20 Certified to be a true and accurate transcript of the  
21 above-entitled matter.

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LISA A. MULLANE, RPR  
Official Court Reporter

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